NO. 84-1070

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED FOR REVIEW

1. Would payment by a state agency to a sectarian school or college for a person's theological education, which person is medically eligible for a state funded vocational rehabilitation program, constitute a violation of the Establishment Clause of the First Amendment as applied to the states through the Fourteenth Amendment?

2. Does a refusal to pay a sectarian school or college for the education and training of a person to become a minister, missionary or Christian youth director constitute a violation of the Free Exercise Clause of the First Amendment as applied to the states by the Fourteenth Amendment?

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COUNTERSTATEMENT OF THE CASE

Respondent feels obligated to make a counter statement of the case because petitioner continues to add "facts" that were not a part of the record, that have never been established by competent evidence and misstates the facts that were established.

Larry Witters applied to the Washington State Commission for the Blind (hereinafter Department) [1] for financial assistance to attend the Inland Empire Bible School to pursue a course in pastoral studies with a goal of becoming qualified to become a minister of the church. The Department denied Mr. Witters' request for financial assistance. Mr. Witters has

1 The Washington State Commission for the Blind has been renamed the Department of Services for the Blind effective June 30, 1983, Laws of 1983, ch. 194, § 3, p. 1050.

unsuccessfully sought a reversal of that initial decision. This matter has proceeded on stipulated facts as reconstructed by the trial court with the assistance of counsel. Those findings of fact are set out in petitioner's Appendix C. Any other "facts" indicated by Mr. Witters in his Statement were not and are not competently established, such as, the affiliation of Inland Empire Bible School with Whitworth College, Petitioner's Brief in Support, p. 6; that the Department (then Commission) adopted its policy statement on religious careers after Mr. Witters applied for aid, Brief in Support, pp. 7-8. Further, there was no factual determination that others attending religious schools were funded under this program if their occupational objective was something other than training for the ministry.

These are only examples and do not represent all inaccuracies.

On appeal to the Washington State Supreme Court, that court held that permitting Mr. Witters to have his training for the ministry paid for by the state would have the "primary effect" of advancing religion and therefore violate the Establishment Clause of the First Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. The Washington State Supreme Court further held that the refusal to provide financial assistance would not violate the Free Exercise Clause of the Federal Constitution. Having based their decision on federal constitutional grounds, the state supreme court did not consider the state constitutional challenges.

SUMMARY OF ARGUMENT

One of the basic tenets of the foundation of this country is the principle of the separation of church and state. Although that separation is not absolute and accommodation must be made, this court has never decided that a state must use its tax dollars to promote religion by funding the theological education of persons wishing to become ministers, missionarys or religious youth directors. This case does not present "an important question of federal law which has not been, but should be, settled by this Court." To fund religious instruction would have a "primary effect" of advancing religion and, therefore, violate the Establishment Clause of the First Amendment of the Constitution which is applicable to the states through the Fourteenth Amendment.

Further, the refusal to fund petitioner's religious education would not prohibit him from freely exercising his religious beliefs. No one is stopping him from becoming a minister if that is, indeed, what he wishes. No one is stopping him from practicing his religion. Nor is this an "equal access" case wherein petitioner is prevented from exercising his religion or religious beliefs. All persons who wish to have the state pay for their religious training in order to become ministers, missionarys or religious youth directors are denied access to those funds.

The Supreme Court of the State of Washington correctly decided this matter under the three-pronged test found in Lemon v. Kurtzman, 403 U.S. 602 (1971) and the petition for a writ of certiorari should be denied.

ARGUMENT

1. <u>This Case Does Not Present An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court</u>.

A. Funding Petitioner's Theological Training At A Sectarian School Violates The Establishment Clause Of The First Amendment.

Although petitioner would suggest that this case presents novel and important issues concerning the Establishment Clause of the First Amendment, the only novelty of this case is that it comes to the court in the reverse posture of many Establishment Clause cases. The state is not trying to fund sectarian schools, nor is the state trying through some "secular purpose" statute to attempt to aid and promote religion. This is the reverse of your

typical aid-to-sectarian schools case. The state, in administering a secular purpose vocational education program authorized by a state statute, refused to give tax dollars to a sectarian school for the sectarian purpose of training and educating its ministers.

Petitioner would suggest that the court has never considered a case where funding of the religious education of an individual has come under constitutional challenge. Respondent would reply that there has never been an issue where the court has been asked to rewrite the history of the United States and rule that states must use their tax dollars to fund the religious training and education of sectarian ministers.

There is nothing at issue in this case about payment of the cost of secular education in a sectarian setting or tax

credits for the cost of providing basic education for a child. See, e.g., Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed. 2d 721 (1983). This case is nothing more than a blatant attempt to force the state to spend its tax dollars to advance and promote religious aims by paying a sectarian institution to educate its future ministers. The idea is absurd and can be based only upon a serious misreading of history, the decisions of this court, as well as the principles of the First Amendment.

The Supreme Court of the State of Washington viewed the three-pronged analysis as set forth in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971) as an appropriate guide to determine whether the aims sought by petitioner would violate the

Establishment Clause of the First Amendment of the constitution. The First Amendment, of course, is applicable to the states. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). As stated in the Lemon case, to determine if state aid is constitutional under the Establishment Clause, a particular governmental funding scheme must have a secular purpose, the primary or principle effect must be one that neither advances nor inhibits religion, and the governmental conduct will not foster an excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. at 612-13. It is well settled that if one prong of the test is breached, the challenged governmental conduct would violate the Establishment Clause. See, e.g., Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66

L.Ed. 2d 199 (1980). Although the court has indicated that the three-pronged test is not the only test that the Supreme Court would consider, Lynch v. Donnelly, --U.S.--, 104 S.Ct. 1355, 79 L.Ed. 2d 604 (1984), nonetheless, the court has used this test in practically every major case with the exception of Marsh v. Chambers, --U.S.--, 103 S.Ct. 3330, 77 L.Ed. 2d 1019 (1983).

Petitioner would suggest that the "tripartite test" was not appropriately used because it focused on the constitutionality of state aid to the petitioner. Yet the primary effect of a statute can only be determined from the facts before it. The court must narrow its focus from the statute as a whole to the only transaction presently at issue. See Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed. 2d 923 (1973).

While the Washington statute, RCW 74.16.181, to assist the visually handicapped is facially neutral, as applied to petitioner, it has the primary effect of advancing religion. A secular purpose and facial neutrality is not enough if, in fact, the state is providing direct, immediate and substantial benefit to a religious activity, i.e., paying for a religious education, not a secular vocational education.

Under all of the principles enunciated by this court, the state supreme court properly determined that Mr. Witters request for financial assistance should be denied.

B. Not Paying For A Person's Religious Instruction Does Not Violate The Free Exercise Clause Of The First Amendment.

Petitioner would further indicate that the state's refusal to pay for petitioner's education and training to become a minister, missionary or Christian youth director created a clear-cut Free Exercise Clause violation. Petition, p. 21. However, the Supreme Court of the State of Washington correctly applied the tests promulgated by this court to determine whether or not petitioner was compelled or pressured to violate a tenet of his religious belief or that the Department's regulation had a "coercive effect" upon him in the practice of his religion. See Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963). Petitioner had chosen to become a minister [2] and the Department's only

2 Mr. Witters may have abandoned the pursuit of this training since he subsequently contacted the

action was to refuse to pay for his theological education.

This is not similar to McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed. 593 (1978) cited by petitioner. In that case the court held a Tennessee statute which made provisions of Tennessee's constitution disqualifying ministers or priests of any denomination from serving as legislators applicable to candidates for a constitutional convention unconstitutional as violating the rights of clergymen to free exercise of religion under the First and Fourteenth Amendment. In order for a minister to have the free exercise of his religion, he had to surrender his right to seek office. The court found that

Department seeking financial assistance to go to diesel mechanic training and, then later, nursing training.

requirement to be unconstitutional. In this case petitioner is not prevented from going to a sectarian school to become a minister. The state is only refusing to subsidize his training and education to become a minister. The interest of maintaining the separation of church and state is a legitimate interest and the means selected in this case are reasonably necessary to achieve that end. Witters is not treated any differently than any other individual who wishes to pursue a theological education to become a minister.

Nor is Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1981) of assistance to petitioner. In that case the court held that a state university's refusal to grant a student religious group access to university facilities generally open to other

student groups was unjustifiable and constituted content-based discrimination against speech. There was no evidence that religion would dominate such an open forum and an "equal access" policy would not have the primary effect of advancing religion. Further, the court noted that religious worship and discussion are forms of speech and association which are protected by the First Amendment. In this case advancement of religion would be a primary effect of funding the theological education of a person intending to become a minister. Yet to deny petitioner the state funds to seek that vocational goal would not prohibit him from worshipping nor going to school nor becoming a minister. The funding of theological education has been left to the religious denominations themselves or to private citizens. Further, in Widmar

v. Vincent, supra, this Court found that all three prongs of the Lemon test had been met so that university policy did not violate the Establishment Clause. It was only then that the Court determined that the policy would have violated the Free Exercise Clause.

CONCLUSION

The Department of Services for the Blind joins with petitioner in stating that the decision of the Supreme Court of the State of Washington does not represent a direct conflict with any decision of this court. Petition, p. 22-23. The issues presented do not represent a substantial federal question that have not been decided by this court nor represent issues that should be further considered by the court. The decision below found that state payment of the education of Mr. Witters to become

a minister would violate the Establishment Clause of the First Amendment of the Federal Constitution since the primary effect of paying for that training would be to advance religion. Therefore, respondent requests that the petition for a writ of certiorari be denied.

DATED this 14th day of February, 1985.

Respectfully submitted,

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